

SERVICE DATE – NOVEMBER 25, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35759

JOHN D. NIELSEN—CONTROL EXEMPTION—NEBKOTA RAILWAY, INC.

Digest:<sup>1</sup> This decision authorizes John D. Nielsen, who controls Class III rail carrier Nebraska Northwestern Railroad, Inc., to acquire control of another Class III rail carrier, Nebkota Railway, Inc.

Decided: November 20, 2013

On August 27, 2013, John D. Nielsen (Nielsen), a noncarrier individual who controls Class III rail carrier Nebraska Northwestern Railroad, Inc. (NNW), filed a petition pursuant to 49 U.S.C. § 10502 for an exemption from the prior approval requirements of 49 U.S.C. §§ 11323-25 to acquire control of Nebkota Railway, Inc. (NRI), another Class III rail carrier. As discussed below, we are granting the petition.

BACKGROUND

NRI owns approximately 4.5 miles of rail line extending east from milepost 404.5 at Chadron, Neb., to milepost 400, and has overhead trackage rights over a line between Chadron and Crawford, Neb.,<sup>2</sup> which NNW currently operates.<sup>3</sup> NRI is a wholly owned subsidiary of West Plains, LLC (WP). Nielsen proposes to acquire control of NRI through the purchase of 100% of NRI's stock from WP, pursuant to a stock purchase agreement. According to the petition, after consummation of the transaction, Nielsen intends to develop business and rail opportunities as part of an effort to restore service on NRI. According to Nielsen, there are no

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Nebkota Ry.—Acquis. and Operation Exemption—Line of Chic. and N. W. Transp. Co., FD 32442 (ICC served Jan. 24, 1994).

<sup>3</sup> Nielsen notes that, due to NRI's connection to NNW, the proposed transaction does not qualify for the Board's class exemption at 49 C.F.R. § 1180.2(d)(2).

customers on the line owned by NRI, and NRI has no current, active rail operations.<sup>4</sup> Nielsen states that NRI's connection to NNW provides NRI's sole link to the national rail system.

Nielsen currently controls one other Class III rail carrier, NNW, which owns and operates approximately 7.22 miles of rail line between Chadron and Dakota Junction, Neb., and leases and operates approximately 20.88 miles of rail line between Dakota Junction and Crawford.<sup>5</sup> As noted, NNW connects at Chadron with NRI.

Nielsen requests expedited consideration of the petition for exemption to allow Nielsen to comply with his commitment to WP to acquire NRI's stock as quickly as possible. The petition also states that expedited consideration would allow Nielsen to replace ties on the NRI trackage before winter. Nielsen states that WP focuses on the sourcing, sorting, storage, and shipment of agricultural products and that WP supports the proposed transaction.<sup>6</sup>

## DISCUSSION AND CONCLUSIONS

The acquisition of control of a rail carrier by a person that is not a rail carrier, but that controls any number of rail carriers, requires the approval of the Board. 49 U.S.C. § 11323(a)(5). Under 49 U.S.C. § 10502(a), however, we must exempt a transaction or service from regulation if we find that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101, and (2) either the transaction or service is limited in scope, or regulation is not needed to protect shippers from the abuse of market power.

In this case, an exemption from the prior approval requirements of 49 U.S.C. §§ 11323-25 is consistent with the standards of 49 U.S.C. § 10502. Detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. § 11323-25 is not necessary here to carry out the rail transportation policy. The proposed transaction would result in a change in ownership of NRI with no adverse impact on competition and would bring NRI under the management of Nielsen, a short line rail carrier operator, with resources to preserve and restore service on NRI. Thus, an exemption would promote the rail transportation policy by minimizing the need for federal regulatory control over the proposed transaction, 49 U.S.C. § 10101(2), and ensuring the development and continuation of a sound rail transportation system that will continue to meet the needs of the shipping public, 49 U.S.C. § 10101(4). And Nielsen's common control of NNW and NRI would allow for efficient coordination of the railroads' connecting operations, fostering sound economic conditions in transportation, 49 U.S.C. § 10101(5), and encouraging efficient management, 49 U.S.C. § 10101(9). Other aspects of the rail transportation policy would not be adversely affected.

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<sup>4</sup> The petition states that the NRI line east of milepost 400 has been railbanked. See Nebkota Ry.—Aban. Exemption—in Dawes and Sheridan Cntys., Neb., AB 988 (Sub-No. 1X) (STB served Oct. 1, 2007).

<sup>5</sup> Neb. Nw. R.R.—Acquis. and Operation Exemption—Dakota, Minn. & E. R.R., FD 35346 (STB served Feb. 10, 2010).

<sup>6</sup> The petition included a letter from WP stating that it supports the proposed transaction and expedited consideration.

Regulation of the proposed transaction is not necessary to protect shippers from an abuse of market power.<sup>7</sup> Although NNW and NRI connect at Chadron, Nielsen indicates that they do not serve any common industries and that NRI currently has no customers. Nielsen states that any traffic that moves west, whether on NRI trackage rights or as an NNW train, must interchange to BNSF Railway Company at Crawford or Dakota, Minnesota & Eastern Railroad Corp. at Dakota Junction, and that those interchanges would remain. We note that no shipper or other interested entity has objected to this acquisition of control.

Under 49 U.S.C. § 10502(g), we may not use our exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under §§ 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

This transaction is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c) because it would not result in any significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 C.F.R. § 1105.8(b) because it would not substantially change the level of maintenance of railroad properties.

As indicated, Nielsen has requested expedited consideration of the petition for exemption. To accommodate Nielsen's request, we will make the exemption effective on 20 days' notice rather than the typical 30 days' notice. We note that no one has objected to the request for expedited consideration. Accordingly, the exemption will be made effective on December 15, 2013.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, we exempt from the prior approval requirements of 49 U.S.C. §§ 11323-25 Nielsen's acquisition of control of NRI.
2. Notice will be published in the Federal Register.
3. This exemption will be effective on December 15, 2013. Petitions for stay must be filed by December 5, 2013. Petitions to reopen must be filed by December 10, 2013.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

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<sup>7</sup> Given our finding that regulation is not needed to protect shippers from the abuse of market power, we need not determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a).